No. 76-1555

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

BASIN, INC., *Petitioner*

vs.

FEDERAL ENERGY ADMINISTRATION, *Respondent*

Reply Brief

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The district court, on the basis of detailed findings of fact made from carefully considered evidence, found the regulatory freeze out of all new competition to be "arbitrary, capricious and an abuse of discretion". TECA reversed *because*, it said, the district court had applied the wrong standard in evaluating the FEA regulation. Now the Solicitor General asks this Court to allow that reversal to stand on the curious ground that "there is no difference" between the standards applied by the two courts below.

The argument is the logical equivalent of an optical illusion. It leaves the reader shaking his head in disbelief.

There is a vast difference between what the Solicitor General says that TECA held and what TECA itself said it was holding. If the Solicitor General's sum-

mary were correct, the appropriate TECA action would have been to affirm — not reverse — the district court.

By this Reply we hope to put the case back into perspective.

The core issue here is one of mounting national importance. Is the procedure for judicial review of administrative action a meaningful right or merely a token gesture?

The District Court

The regulation in question is a total lockout of new competition. The district court so found:

> "If the freeze rule as presently constituted remains in effect, in all likelihood, Basin will be *forced out of business*, and the entry of *any* newcomer into the crude oil marketing business will be effectively foreclosed." (App. 16).

On its face such an iron curtain would appear to be quite at odds with declared national policy. Speaking on the floor of the Senate with reference to the Preliminary Injunction in this very case, Senator Moss proclaimed the national gravity of what the FEA has done (Cong. Record Dec. 22, 1975, S22395):

> "One would think that the antitrust laws had never been enacted. FEA has apparently never heard of them or the 'priority needs to foster and and preserve competition' that Congress wrote into FEA's organic act. The District Court, in

> enjoining enforcement of Section 211.63 of the regulation was conservative in characterizing that regulation as 'questionable.' This regulation .... is plainly in conflict with the intent and will of Congress."

Deputy Administrator John A. Hill — the number two man in the FEA[1]—explained in his testimony in the district court that the freeze had only been considered acceptable in the first place as a very short-lived temporary measure:

> "Q You were willing to accept the regulation which had that effect at the time because you thought you were dealing with a *very temporary* regulatory program, one I believe you said you contemplated would not last more than four to six months?
>
> "A That is correct. We contemplated a program to last *only* during the period of the embargo and it was our estimate at the time that the embargo probably would not last beyond six months." (R 192)
>
> ...
>
> "Q Does the FEA consider that it would be *just* —to freeze all new market entrants out of the crude oil marketing business indefinitely?
>
> "A I think as a general rule we would consider that to be **an inappropriate and absurd energy policy.**" (R 194).

[1] Administrator Zarb was invited to appear as FEA spokesman but he deferred to Hill. Counsel for the FEA explained, "There is no suggestion that Mr. Zarb has sufficient knowledge to add to this particular case. Mr. Hill is the person selected out. His deposition is before the Court and its indications. In what he said, *we are fully bound.*" (R 642-3).

To deprive all newcomers permanently — or indefinitely — of the right to compete is certainly arbitrary unless there is an inescapable necessity for such a drastic anticompetitive restraint. The first TECA panel concluded that the lockout was not rational in the absence of a showing of compelling circumstances:

> "Certainly, any governmental action that will effectively eliminate relatively recent comers from an industry calls for critical scrutiny and can be justified *only* by a clear showing of compelling circumstances." (App. 6).

The Solicitor General argues, ". . . . we know of no rule of administrative law requiring an agency to advance compelling circumstances to sustain an *otherwise rational* [sic] regulation." Opp.Br. 6 n.5. The point is that the first TECA panel had held that the lockout was *not* "otherwise rational" unless justified by compelling circumstances. And it remanded the case to the district court to hear evidence and determine whether any such compelling circumstances in fact exist.

Both sides presented evidence. The district court made detailed fact findings from that evidence.

The Solicitor General reargues the *factual* findings made against the FEA. His Brief in Opposition (p. 7) quotes the completely erroneous statement in the TECA opinion from which certiorari is sought that "it is uncontested that the supplier-purchaser rule stabilizes the distribution system and greatly helps to protect the sources of supply of the small, independent refiners.". In fact that assertion was hotly contested.

The evidence showed it to be completely false. And the court that heard that evidence simply found the facts against that assertion:

> "There are no compelling circumstances justifying the effect of 10 C.F.R. §211.63 in effectively eliminating relatively recent comers — including Basin — from the crude oil marketing business. Neither the problem of layering nor the problem of assuring small independent refiners adequate supplies of crude oil constitute compelling circumstances justifying the existence of 10 C.F.R. §211.63." (App. 17).

Of course, it is reasoning in a circle to argue that a regulation which freezes a supply into historical purchasers is shown to be justified because it freezes the supply into those purchasers. The contention that a freeze out of all new competition from the crude oil marketing industry is necessary to permit existing independent refiners to compete simply did not stand up under an evidentiary review. The district court's considered rejection of that attempted justification has since been reenforced by an identical conclusion from the *Presidential Task Force on Reform of Federal Energy Administration Regulations* under the co-chairmanship of the FEA Administrator himself. Pet. 10.

The Solicitor General also argues that "the 'substantial exceptions' to the rule 'demonstrate an attempt by FEA to aid the new resellers, without harming the refiners' and 'further support the *reasonableness* of FEA's approach'." Opp.Br. 7. But saying so

does not make it so! This again presents a fact issue decided against the FEA on ample evidence. A glance at a few highlights from that evidence is not out of place in this reply for it illustrates why, in today's atmosphere of massive administrative regulations, meaningful judicial review is so terribly important to the preservation of a government of laws.

In November of 1975 — while the *first* appeal to TECA was pending — the FEA hastily amended the freeze regulation and represented to TECA that the regulation as amended was at last workable to permit "the substitution of new resellers [marketers] of crude oil for present resellers. . . .". App. 3. Basin contended that "this formal broadening of . . . access to producers [was] practically meaningless." The first TECA panel held, "we view this as involving relevant questions of *fact* . . . ." and remanded to the district court to make those determinations. (App. 4).

The district court received evidence on those questions. FEA's witness Paige — the one man who wrote the amended as well as the original lockout regulation — conceded in his testimony that FEA now recognized that "the regulation we had adopted in November of '75 was *not* really workable." (R 513 and 680).

Paige had since again rewritten the regulation and this time had created an unbelievable obstacle course against new competitors. He imposed upon a new marketer, as a condition of access to supply, the obviously impossible requirement of obtaining the advance unanimous consent of all ultimate refiners who re-

ceived any part of each barrel of oil — characteristically commingled — which the new marketer sought to purchase. Witness his actual testimony (R 632):

"Q Suppose part of the people consent and part don't. Are we free to buy the oil or not?

"A If you follow the approach in Option 1 that Basin has under this proposal, it would appear that the consent of *all* of the refiners is required.

"Q Has to be unanimous, doesn't it?

"A Yes. Under Option 1, I would like to stress.

"Q That's correct. We will get into Option 2 in a moment.

"A Okay.

"Q So *unless Basin could get the consent in this case of at least 19 different people, then it could not make this purchase that had been agreed upon by both seller and buyer, could it?*

"A Under Option 1, *they could not.*

"Q All right. Now let's turn to Option No. 2. What is that?

"A Option 2, basically provides that Basin would not have to obtain the consent of any of the refiners if it offered to supply — continued to supply the crude oil to the refiner or refineries, the identity of which Basin has been advised.

"Q How much crude oil to each refiner?

"A The regulation contemplates the same flow to the refiner that existed prior to the termination.

"Q Which, of course, means that Basin must know how much of the volume from this

lease goes to each individual refiner? Right?

"A Yes. I think that's correct.

"Q How is Basin to determine that?"

Paige had no satisfactory answer to that last question. The evidence showed that even the refiners themselves could not determine that. So FEA's Paige — still determined to justify the regulation he had written — testified that the new marketer could obtain the necessary information from the FEA's Regional Office (R 648):

"Q Give mve the name of that man that I am supposed to contact.

"A It would be at the Dallas Regional Office.

"Q Mr. Fowler?

"A He is the Regional Administrator.

"Q How in the world is he going to know?

"A Well, he would find out and attempt to make the regulation work for you."

This was demonstrably false. The subsequent record testimony showed that Basin had in fact gone to the FEA Regional Office for that information and received this polite rejection from the Regional Administrator (R 1181):

> "He was very courteous and very considerate but all of his answers were negative. He said that the FEA did not have that information. He said that they would not attempt to get it for us and, even if they did have it, it would be of a proprietary nature, consequently classified, and consequently they couldn't furnish it to us if they had it."

Some of Paige's testimony even cast doubt on the FEA's good faith (R 657):

"Q . . . Is is true . . . that you *deliberately* wrote into this regulation a condition which you knew would be *impossible* to meet?

"A I think in certain situations it would be impossible to meet. I said that before, yes.

"Q And you deliberately wrote it that way, did you not?

"A Yes.

"Q There was no accident; right?

"A Yes, that's correct."

That is illustrative of the *type* of evidence before the reviewing district court. The fact findings were against the FEA, culminating with a finding that "none of these amendments to the freeze rule have meaningfully broadened Basin's access to crude oil supplies'" (App. 15-16).

Applying the *statutory* standard of review[2], from the ample and thoroughly considered evidence which, in response to the first TECA mandate, had been adduced by both the citizen and the agency, the district court made the ultimate determination:

> "10 C.F.R. §211.63 is arbitrary, capricious, and an abuse of discretion in that it effectively eliminates recent comers from the crude oil marketing industry without any compelling circumstances to do so and in that it does not, as to such new market entrants, constitute an allocation of crude oil but is rather a total denial of access to

[2]Administrative Procedure Act, 5 USC 706(2); Economic Stabilization Act of 1970, 12 USC 1904 note, §211(d)(1) quoted in full in Pet. 3.

crude oil to them and is unlawfully discriminatory as to the Plaintiff and any other new market entrant." (App. 18).

The judicial review was thorough, objective and meaningful. The review standard was as prescribed by statute and the relief granted was that which the statute mandated.

The TECA Reversal

The second TECA paned did *not* challenge the sufficency of the district court's findings nor of the evidence to support them. Nor did it deny that the district court had faithfully followed the mandate of the first TECA panel. Rather it reversed because it disapproved of the mandate of the first TECA panel and of the standard of review employed by the district court:

> "Of critical importance to this case is *what standard the trial court should have applied* in evaluating the FEA's regulation. This Court concludes that the regulation should have been upheld if it had any rational basis to support it." (App. 23).

The very heart of TECA's reversal is its erroneous conclusion that the standard of review applied by the district court (and prescribed by statute) was different from the standard which the second TECA panel would have applied and hence was wrong. Yet the Solicitor General argues that *"There is no difference* . . . Agency action that has a rational basis by definition is not arbitrary, capricious or an abuse of discre-

tion." Opp. Br. 6. If that be so, then the converse would also be true. Agency action which has been determined to be arbitrary, capricious and an abuse of discretion by definition does *not* have a rational basis. And the district court's action should therefore have been affirmed.

The Solicitor General is equally unsound in asking this Court to accept the earlier decision in *Condor Operating Company v. Sawhill*, 514 F.2d 351 (TECA 1975), cert. den. 421 U.S. 976 as foreclosing review here. That case involved only the issue of whether a producer was entitled to refine his own crude oil or whether he could be compelled to continue selling it to the major company refiner (Phillips Petroleum Company) that had been taking it. The question was *who* the producer could receive his money from — not, as here, whether a company was entitled to engage in business.

Moreover, *Condor* was cited in the first TECA opinion (App. 3) which remanded the case for a full judicial review and ordered an "expedited hearing" (App. 7). If *Condor* were dispositive, that order would have been a cruel and idle gesture.

The Solicitor General says, "petitioner *alleges* that the regulation will prevent it from remaining in the crude oil marketing business." Opp. Br. 6. That is no mere allegation. It is a judicially determined fact (App. 16) accepted by TECA — *with a holding that it makes no difference* (App. 33):

> **"We do not overturn the district court's finding that new entrants to the business are foreclosed.**
>
> . . .
>
> **"Basin may engage in any other lawful activity."**

It is little comfort for a court to tell petitioner that it "may engage in any *other* lawful activity" — like lifting a lawyer's license with the consolation that he is free to enter the real estate business. The lack of realism is reminiscent of the callous response attributed to Marie Antoinette, "If they have no bread, let them eat cake." See Pet. 9 n. 6.

The evil of the regulatory lockout is compounded by the fact that, as the handy work of one man, it was suddenly imposed in the first place "without any published intention to do so" — no attempt to comply with the notice requirements of the Administrative Procedure Act. (App. 10).

The decision of the second TECA panel vests in FEA the power to put one small company out of business and to keep all other new competition out — forever. That ruling is so frightening and so far reaching that it surely merits a higher review by this Court.

Conclusion

We are mindful and respectful of this Court's busy docket. We recall Judge Shirley N. Hufstedler's observation in her scholarly paper "Courtship and Other Legal Arts", 60 ABA Journal 545, 546-7 (May 1974):

> "The Supreme Court now hears fewer than 1 per cent of the cases decided by the federal courts of appeals . . . Courts of appeals can be neither right nor harmonious 99 per cent of the time."

Yet this Court has often considered issues of far less concern to an ordered system of justice than the issue involved here. And if courts of appeal can not be right 99 per cent of the time, *a fortiori* neither can the FEA.

If any court of appeals ever *needed* the benefit of judicial supervision it is the understaffed and overworked Temporary [sic] Emergency Court of Appeals which has the *exclusive* intermediate appellate say over one of the most pervasive and active areas of administrative action in America today.[8]

Respectfully submitted,

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[8]Cf. the public comments of the Chief Justice of the United States quoted at Pet. 15.